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conciliar and papal law**

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Procedure and Hierarchy: Models of Episcopal Election in Late Antique Conciliar and Papal Rule Making

Andreas Thier

Introductory Remarks

Many contributions of this volume address the practice of episcopal elections and give fascinating examples of concrete electoral history (and histories). These dynamics are reflected in an abundant multitude of legal provisions issued by councils and popes. As a matter of fact these rules have been frequently discussed; Peter Norton for example has given a broad analysis of, what he called, “legislation and theory”¹. This paper will try to carry on with this discussion of the legal rulings on episcopal elections by the Roman bishop and the councils during Late Antiquity and early middle Ages, i. e. during the 3rd to the 6th centuries. It shall be argued here that different kinds of ruling tendencies can be distinguished. Furthermore, it shall be demonstrated that these rules were deeply rooted in the concept or at least the language of Cyprian’s ecclesiological idea of elections as procedure of strict scrutiny by clerics, conprovincial bishops and the laity. Hence, in the first section of this paper (below II.) Cyprian’s concept shall be discussed. It shall be shown that Cyprian formed a conception of episcopal elections, which, partly inspired by the language of Roman law, was intended to ensure the righteousness of the electoral result understood as its accordance with the divine will. The second part of the paper (below III.) turns to the conciliar rulings on episcopal elections.

1 P. Norton, *Episcopal Elections 250-600. Hierarchy and Popular Will in Late Antiquity*, Oxford 2007, 18-51 with further reference. R. Gryson, *Les élections ecclésiastiques au III^e siècle*, RHE 68, 1973, 353-404; Id., *Les élections épiscopales en Orient au IV^e siècle*, RHE 74, 1979, 300-345; Id., *Les élections épiscopales en Occident au IV^e siècle*, RHE 55, 1980, 257-283. F. Lotter, *Designation und angebliches Kooptationsrecht bei Bischofserhebungen. Zu Ausbildung und Anwendung des Prinzips der kanonischen Wahl bis zu den Anfängen der fränkischen Zeit*, ZSRG.K 59, 1973, 112-150.

It shall be argued that these bodies, while partly adopting Cyprian's ideas or just his language, favored at certain points a model of a ruling with the bishops as dominating element of the electoral procedure. But this tendency would stop in the 5th century. The third part of this paper (below IV.) shall discuss another, opposing trend in ecclesiastical rule making of the 5th century. Here, the function of the laity as institution of scrutiny would gain more importance, and later on the willing consent of the clerics and the laity moved into the center of rule making. Eventually, in particular the decretals of Pope Leo I combined elements of the Cyprianic tradition and the idea of ecclesiastical hierarchical order.

Cyprian's Ecclesiological Concept of Episcopal Elections

In the writings of Cyprian of Carthage († 258) the evolution of the monepiscopate² found one of its most important elaborations. In the Cyprianic ecclesiology³ the episcopal position was institutionally essential for the whole ecclesiastical order: The church was "based on the bishops" and every single ecclesiastical action was directed by them⁴. This statement was made in the situation of permanent inner ecclesiastical struggle and continuing Roman suppression of the Christian religion⁵, and against this background Cyprian considered the episcopate as the essential safeguard for cohesion of ecclesiastical order: "There is only one single episcopate, in which every single man has an indivisible share". As well as "there is one single church of Christ, divided in many limbs; there is also one single episcopate, scattered in the unanimous multiplicity of the many bishops".⁶ As a consequence the obedience to episcopal authority constituted even an

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- 2 E. Dassmann, Zur Entstehung des Monepiskopats, JAC 17, 1974, 74-90, repr. with a supplement in: E. Dassmann, Ämter und die Dienste in den frühchristlichen Gemeinden, Hereditas, Studien zur alten Kirchengeschichte 8, Bonn 1994, 49-73; G. Schöllgen, Monepiskopat und monarchischer Episkopat. Eine Bemerkung zur Terminologie, ZNW 77, 1986, 146-151. See also C. Rapp, Holy Bishops in Late Antiquity. The Nature of Christian Leadership in an Age of Transition. The Transformation of the Classical Heritage 37, Berkeley/Los Angeles/London 2005, 26-28.
 - 3 A. Adolph, Die Theologie der Einheit der Kirche bei Cyprian, EHS.T 460, Frankfurt a. M./Berlin/Bern/New York/Paris/Wien 1993 with further reference.
 - 4 Cyprian, ep. 33,1,1 (CChr.SL III/B, 164, 10f., Diercks): ... *ut ecclesia super episcopos constituatur et omnis actus ecclesiae per eosdem praepositos gubernetur*.
 - 5 For a survey see G. W. Clarke, The Letters of St. Cyprian of Carthage I, ACW 43, New York/Ramsey (N. J.) 1984, 12-21.
 - 6 *Episcopatus unus est cuius in solidum pars tenetur*, Cyprian, De ecclesiae catholicae unitate, cap. 5 (CChr.SL III/1, 252, 126 Bevenot).

essential attribute of ecclesiastical membership, because “the bishop is in the church and the church is in the bishop, and who is not with the bishop is not in the church.”⁷ Given this importance of the episcopate the episcopal promotion itself became in a certain way essential for Cyprian’s ecclesiology. Expressions like *ordinatio iure perfecta* (the ordination in accordance with the law)⁸ indicate that normative rules were of particular importance in this regard. In fact, Cyprian demanded that “carefully the divine tradition and the apostolic caution are upheld... [and] that ... the [episcopal] ordinations are celebrated correctly (*rite*)”⁹. A “correct” ordination in this sense meant that three authorities would act jointly each of them fulfilling a specific task: The conprovincial bishops would not only consecrate the new bishop, but also give their *iudicium*, the laity (mostly called *plebs*, sometimes also *populus*) would deliver its *suffragium* and the clergy would give its *testimonium*.¹⁰ The semantics of these expressions is, however, not always consistent in Cyprian’s writings. Sometimes, for example, the *iudicium* was attributed to God¹¹, sometimes the *testimonium* appeared as an attribute of the conprovincial bishops¹². An illustrative example for this semantical oscillation is the following statement, often quoted in medieval canonical collections¹³: *Factus est autem Cornelius episcopus de Dei et Christi eius iudicio, de clericorum paene omnium testimonio, de plebis quae tunc adfuit suffragio, ...*¹⁴ Here, all three elements of a valid episcopal promotion (*factus est*) appeared. But the *iudicium* was attributed not to the bishops, but to God and Christ, while *suffragium* and *testimonium* remained linked to the *plebs* and to the clergy.

7 Cyprian, ep. 66, 8, 3 (CChr.SL III/C, 443, 154-156 Diercks): ... *episcopum in ecclesia esse et ecclesiam in episcopo et si qui cum episcopo non sit, in ecclesia non esse*.

8 Cyprian, ep. 67, 4, 2 (CChr.SL III/C, 453, 82f. Diercks)

9 Cyprian, ep. 67, 5, 1 (CChr.SL III/C, 454, 99-102 Diercks): *quod diligenter de traditione diuina et apostolica obseruatione seruandum est ... ut ad ordinationes rite celebrandas...*

10 For a deeper analysis of the following see A. Thier, *Hierarchie und Autonomie. Regelungstraditionen der Bischofsbestellung in der Geschichte des kirchlichen Wahlrechts bis 1140*, Studien zur europäischen Rechtsgeschichte 257, Frankfurt am Main 2011, 40-61.

11 See for example Cyprian ep. 68, 2, 1 (CChr.SL III/C, 464, 32 Diercks): *de dei iudicio*.

12 Cyprian, ep. 55, 8, 1 (CChr.SL III/B, 264, 115 Diercks): *coepiscoporum testimonio*.

13 For a discussion of this transmission see Thier, *Hierarchie und Autonomie* (see note 10), 367-380.

14 Cyprian, ep. 55, 8, 4 (CChr.SL III/B, 265, 129-135 Diercks); emphasis mine.

This and similar Cyprianic statements¹⁵ evoke the question about the meaning of these expressions. This question is getting even more difficult by the fact that *iudicium*, *suffragium* and *testimonium* were also used in the context of the Roman law, in particular with regard to the legal rules for the Roman magistrates. Here *iudicium* meant the evaluation of or the judgement on the candidate for a public office¹⁶. This sort of *iudicium* was – mostly – attributed to the *princeps*, Ulpian for example mentioned the *dignitates principis iudicio*.¹⁷ Thus *iudicium* could be interpreted as a “judgement on the admittance to a (public) office”.¹⁸ The expression *testimonium* was rarely used. During the Roman principate the expression referred to an act of (public) recommendation for a public office.¹⁹ Thus in the Cyprianic context the expression might be translated as “endorsement” of an episcopal candidate.²⁰ The expression *suffragium* was more common in the language of Roman law. Originally, *suffragium* meant the delivery of a voting shard. The *suffragium populi* described the participation of the people in the Roman *comitia*, but during the principate this *suffragium* became more and more an acclamatory act with respect to proposals of the *princeps*²¹ and meant later on in particular the recommendation of a superior person for a public office.²²

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- 15 As an example for the attribution of the expression *iudicium* to the bishops see Cyprian, ep. 59,5,2 (CChr.SL III/B, 454f., 106-110 Diercks): *Quod et apud uos factum in Sabini collegae nostri ordinatione, ut de uniuersae fraternitatis suffragio et de episcoporum qui in praesentiam conuenerant quique de eo ad uos litteras fecerant iudicio episcopatus ei deferretur et manus ei in locum Basilidis inponeretur*. Interesting enough, here the *suffragium* is attributed to a *univ[er]sa fraternitas*. Emphasis mine.
 - 16 For a survey see R. Frei-Stolba, *Untersuchungen zu den Wahlen in der römischen Kaiserzeit*, Zürich 1967, 201-203.
 - 17 Digestae 50, 3, 2. For a discussion of this text see F. Jacques, *Le privilege De Liberte: Politique imperiale et autonomie municipale dans des cites de l'Occident Romain* (161-244), CEFR 76, Paris/Rome 1984, 328, 458-460.
 - 18 For a similar approach see A. Pabst, *Comitia imperii. Ideelle Grundlagen des römischen Kaisertums*, Darmstadt 1997, 17, and Frei-Stolba, *Wahlen* (see note 16), 201f. with note 44.
 - 19 Frei-Stolba, *Wahlen* (see note 16), 206.
 - 20 Same perspective with T. Osawa, *Das Bischofseinsetzungsverfahren bei Cyprian. Historische Untersuchungen zu den Begriffen iudicium, suffragium, testimonium, consensus*, EHS.T 178, Frankfurt a. M./Bern 1983, 174 f.; P. Granfield, *Episcopal Elections in Cyprian: Clerical and Lay Participation*, TS 37, 1976, 41-52, 50 f., even argues that the clergy had the power to nominate an Episcopal candidate.
 - 21 E. S. Staveley, *Greek and Roman Voting and Elections*, London 1972, 217-223.
 - 22 J.-U. Krause, *Spätantike Patronatsformen im Westen des Römischen Reiches*, Vestigia 38, München 1987, 50-65; for a broad reference of sources see O. Hirschfeld, *Die kaiserlichen Verwaltungsbeamten bis auf Diocletian*, Berlin ²1905, 443 f. with note 5.

These obvious parallels are more than mere coincidence. Cyprian lived, taught and wrote in a Roman province, he was educated in a Roman school of rhetoric and worked originally as teacher of rhetoric. This education included the study of Roman law texts.²³ In view of these connections and given the fact that also some other essential elements of Cyprian's ecclesiology are shaped by the semantics of Roman law²⁴, it has been argued²⁵ that in particular *suffragium plebis* meant little more than an act of passive consent²⁶ while the Cyprianic *iudicium* described the essential element of a selective choice by the conprovincial bishops as representatives of God²⁷.

But Cyprian's writings gainsay these arguments. In fact, the purpose of electoral procedure was the careful examination of the candidate and in particular his *dignitas*. Cyprian argued against the ordination of an *indignus*: *Ordinari enim nonnumquam indignos non secundum dei voluntatem* (the ordination of an unworthy person would be not according to God's will)²⁸. By using the expression *dignitas* Cyprian apparently again referred to the Roman legal culture: In the context of Roman law *Dignitas* described – besides the dignity of an office (or the office as dignity itself) – the personal qualifications required for a public office²⁹. For Cyprian *dignitas* had a similar meaning. This comes clear with regard to the function

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- 23 For a survey see A. Hoffmann, *Kirchliche Strukturen und Römisches Recht bei Cyprian von Karthago*, RSWV n. s. 92, Paderborn/München/Wien/Zürich 2000, 42-45 with further reference.
 - 24 Hoffmann, *Kirchliche Strukturen* (see note 23), 297-307; essential contribution A. Beck, *Römisches Recht bei Tertullian und Cyprian*, SKG.G. 7/2, Halle 1930, repr. Aalen 1967, 134-136; J. Gaudemet, *Le droit Romain dans la littérature chrétienne occidentale du IIIe au Ve siècle*, IRMA 1/3/b, Milan 1978, 39-41; Thier, *Hierarchie und Autonomie* (see note 10), 48-54.
 - 25 For an outline of the recent discussion see Hoffmann, *Kirchliche Strukturen* (see note 23), 22-26.
 - 26 This argument is brought forward in particular by J. Speigl, *Cyprian über das iudicium dei bei der Bischofseinsetzung*, RQ 69, 1974, 30-45, 37f. and passim; Osawa, *Bischofseinsetzung* (see note 20), 74-76.
 - 27 See for example H. Freiherr v. Campenhausen, *Kirchliches Amt und geistliche Vollmacht in den ersten drei Jahrhunderten*, BHTh 14, Tübingen 1963, 301; D. Claude, *Die Bestellung der Bischöfe im merowingischen Reiche*, in: ZSRG.K 49, 1963, 1-75, here 6.
 - 28 Cyprian, ep. 67, 4, 4 (CChr.SL III/B, 453f., 94f. Diercks).
 - 29 V. Pöschl, *Der Begriff der Würde im antiken Rom und später*, SHAWPH 1989/3, Heidelberg 1989, passim; for the antique use of dignitas in general see V. Pöschl, *Art. Würde I*, GGB 7, Stuttgart 1992, 637-645, and W. Dürig, *Art. Dignitas*, RAC 3, Stuttgart 1957, 1024-1035; see also H. Löhken, *Ordines Dignitatum. Untersuchungen zur formalen Konstituierung der spätantiken Führungsschicht*, KHab 30, Köln/Wien 1982, 13f. and passim.

of the plebeian *suffragium*. Cyprian demanded that every episcopal election should take place “with the laity being present, which knows every detail of every single candidate and has looked through everyone’s acting being associated with him”.³⁰ In this perspective the, as it might be called, social knowledge of the laity about the candidate’s living guaranteed the choice of the right person.³¹ Similar functions were attributed to the clergy and the conprovincial bishops. This comes clear in the Cyprianic rule, “we see it resulting from divine authority that the priest (i. e. the bishop) shall be chosen with the plebeians being present before everyone’s very eyes and he shall be proven as worthy and suitable by public judgement (*iudicio*) and endorsement (*testimonio*)”.³² So, election in the Cyprianic sense was a public examination of the candidate in order to make sure that “the plebeians being present either the (candidate’s) crimes are revealed or his merits are brought out”.³³ This procedure should make sure that only the *dignus* would be promoted to episcopal office³⁴. Even though Cyprian attributed in particular the “obedient plebeians ... the power to elect worthy priests or to reject the unworthy”,³⁵ this did not mean a real choice (let alone a sort of nomination power). In other words: Election in the Cyprianic sense meant examining and evaluating. It might – perhaps – be called an “aggregation of judgements”³⁶ of three different authorities (laity, clergy and conprovincial bishops) in the interest of the rightness of an episcopal selection in terms of the divine will.

30 Cyprian, ep. 67, 5, 1 (CChr.SL III/B, 454, 104f. Diercks): ... *plebe praesente, quae singulorum uitam plenissime nouit et uniuscuiusque actum de eius conuersatione perspexit.*

31 Similar interpretations by Jacques, Le privilege (see note 17), 432, and J-A. S. Kanyang, Episcopus et plebs. L’évêque et la communauté ecclésiale dans les conciles africains (345-525), EHS.T 701, Berlin 2000, 55-59.

32 Cyprian, ep. 67, 4, 1 (CChr.SL III/B, 452, 72-74 Diercks): *ipsum uidemus de diuina auctoritate descendere, ut sacerdos plebe praesente sub omnium oculis deligatur (sic) et dignus atque idoneus publico iudicio ac testimonio conprobetur.*

33 Cyprian, ep. 67, 4, 2 (CChr.SL III/B, 453, 81f. Diercks): *plebe praesente uel detegantur malorum crimina uel bonorum merita praedicentur.*

34 For a similar perspective see Granfield, Episcopal Elections (see note 20), 43; see also A. Carboni, Vox Populi, Vox Dei. Provvidentialismo ed Elezioni Episcopali: JUS. Rivista di Scienze Giuridiche n. s. 11, 1960, 93-104, 223-245, 97-99.

35 Cyprian, ep. 67, 3, 2 (CChr.SL III/B, 451f., 68-71 Diercks): *plebs obsequens ... ipsa maxime habeat potestatem uel eligendi dignos sacerdotes uel indignos recusandi.*

36 I. McLean, H. Lorrey, J. Colomer, Voting in the Medieval Papacy and Religious Orders, in: Modeling Decisions for Artificial Intelligence. Lecture Notes in Computer Science, 4617, ed. by Vicenç Torra, Yasuo Narukawa, Yuji Yoshida, Berlin/New York 2007, 30-44, here 43, with reference to D. Black, The Theory of Committees, Cambridge 1958, repr. Boston/Dordrecht/Lancaster 1986.

The Episcopal Model of Episcopal Promotions

Cyprian's ideas were strongly influential in ecclesiastical rule making of the following centuries. Sometimes, however, the councils or the Roman bishops, the later popes, gave one or another party of the electoral procedure more weight³⁷: The conciliar legislation of the 4th, 5th and 6th centuries stressed the importance of the episcopal part. Typical in this regard was a rule issued by the influential Nicaean council (325): Here, it was ordered that bishops should be ordained by other bishops, an expression like "election" was not used, and laity and clergy were not mentioned.³⁸ There was also a slight hint to the Cyprianic idea of episcopal promotion as examination: For another canon stressed that the episcopal candidate had to comply with the "ecclesiastical rule" (*ecclesiastica regula*) and called the final decision about this candidate a "judgment" (*sententia*).³⁹ Here, the notion of the episcopal promotion as a legally based examination reappeared. This idea (and its obvious Cyprianic background) was even more visible in a provision of the council of Antioch (341), which referred with regard to episcopal promotion explicitly to the "judgments of the bishops" ἐπικρίσεως ἐπισκόπων and the requirement of a "worthy" (τὸν ἄξιον) as bishop.⁴⁰ But again the clergy and the laity were left unmentioned in this provision. Even stronger was the opposition against the laity in two widespread (though possibly forged) canons of an (alleged) council of Laodicea (held around 380 in today's Turkey): C. 12 ruled "The rabble (τοῖς ὄχλοις) is not permitted to choose those, which shall be promoted to the priesthood" ("priesthood" here refers to the episcopate). C. 13 declared "about this, that bishops shall be invested in ecclesiastical power the surrounding metropolitans and bishops shall judge (κρίσει)".⁴¹ Obviously,

37 For a deeper discussion of this development see Thier, *Hierarchie und Autonomie* (see note 10), 63-92.

38 Vgl. c. 4 of the Nicaean council (COD 1, 21f., 89-98 Alberigo), latin version: *Episcopum convenit maxime quidem ab omnibus qui sunt in provincia episcopis ordinari. Si autem hoc difficile fuerit, aut propter instantem necessitatem aut propter itineris longitudinem: modis omnibus tamen tribus in id ipsum convenientibus et absentibus episcopis pariter decernentibus et per scripta consentientibus tunc ordinatio celebretur.*

39 In the original Greek the conciliar fathers also used a strongly legally connoted expression κατὰ κανόνα ἐκκλησιαστικόν (according to the ecclesiastical canons), while the expression ψῆφος (judgement) appears to be a more general term in the sense of evaluation; for the Greek text (c. 6) see COD 1, 23, 149-153 (Alb.).

40 Cf. *Canones Apostolorum et Conciliorum Saeculorum* IV. V. VI. VII., *Bibliotheca Ecclesiastica*, 1, Berlin 1839, repr. Turin 1959, part 1, 85.

41 *Canones Apostolorum et Conciliorum* (see note 40, 74f.) c. 12: Περὶ τοῦ μὴ τοῖς ὄχλοις ἐπιτρέπειν, τὰς ἐκλογὰς ποιεῖσθαι μελλόντων καθίστασθαι εἰς ἱερατεῖον; c.

these canons adopted elements of the ecclesiastical tradition of rule making established by Cyprian in particular by referring to the judicial position of bishops. At the same time, however, the participatory power of the laity was apparently eliminated: The laity was understood as “rabble” and excluded from election; only bishops and metropolitans were fully involved in the electoral procedure. Apparently, this, as it might be called, “episcopal tradition”⁴² of electoral rule making reached its height in this Laodicean provision. Interestingly enough these rules were apparently not consistent with electoral practice in the Eastern part of the Mediterranean area⁴³. Peter of Alexandria (373-383) for example referred explicitly to “ecclesiastical rules” οἱ τῆς Ἐκκλησίας θεσμοὶ where the demand of the laity (αἰτήσῃ λαῶν) had been given special importance⁴⁴. This and also a contradicting and apparently strongly Cyprianic influenced ruling in the *Constitutiones Apostolorum*,⁴⁵ created around 380 as well⁴⁶, suggests that c. 12 and c. 13 could be forgeries.

Consent and Examination: Models of Laical Participation in Episcopal Elections

As indicated in Peter of Alexandria’s statement, the perception in particular of the laity remained apparently an issue of a certain importance. During the following decades the laity would be put into two different roles:

13: Περὶ τοῦ τοὺς ἐπισκόπους κρίσει τῶν μητροπολιτῶν καὶ τῶν περίξ ἐπισκόπων καθίστασθαι εἰς τὴν ἐκκλησιαστικὴν ἀρχὴν [...]. For a deeper discussion of this provision see J. Gaudemet, Note sur la transmission des c. 12 et 13 du concile de Laodicée relatifs à la désignation des évêques, in: *Liber Amicorum Monseigneur Onclin, Löwen 1976*, 87-98, repr. in: J. Gaudemet, *La société ecclésiastique dans l’Occident médiéval*, London 1980, Nr. IX. and Thier, *Hierarchie und Autonomie* (see note 10), 92-97.

42 For this term see Thier, *Hierarchie und Autonomie* (see note 10), 64.

43 F. L. Ganshof, Note sur l’élection des évêques dans l’empire romain au IV^{me} et pendant la première moitié du V^{me} siècle, *RIDA* 4, 1950, (=Mélanges Fernand de Visscher 3), 407-498, 471-474; Gryson, Les élections épiscopales en Orient au IV^e siècle (see note 1), 314-341; Norton, *Episcopal Elections* (see note 1), 74-78.

44 Cf. Theod. h.e. 4, 22, 9 (GCS Theodoret [NF 5], 252,2-13 Hansen). For the context of this statement see Gryson, *Les élections épiscopales en Orient au IV^e siècle* (see note 1), 326f.

45 *Constitutiones Apostolorum*, 8, 4, 4 (SC 336, 142, 15f.): ἀριστίδην ὑπὸ παντὸς τοῦ λαοῦ ἐκλεγμένον.

46 M. Metzger, Art. „Konstitutionen, (Pseud-)Apostolische”, in: *TRE* 19, 540-544 with further reference.

Sometimes, the councils stressed the examining, vetting function of the *populus*, thus continuing the Cyprianic tradition. This comes especially clear in a provision of the council of Hippo (393/397) declaring that “no one shall be ordained if he has not been examined before by the examination of the bishops or the testimony (*testimonio*) of the people”.⁴⁷ Here, the Cyprianic idea of the testimonial function of the laity was apparently adopted. There were other at least similar conciliar provisions pointing in this conceptual direction⁴⁸. The same is true for the early decretal rulings: Siricius (384-398) focused on the *testimonium* of the laity, stressing at the same time “not that what the people want, but what is demanded by evangelical discipline” would matter⁴⁹.

However, another notion of the laity was soon getting stronger. It was the idea of popular consent which would eventually come to be one of the defining elements of the framework of episcopal promotions: The council of Serdica had still ruled “that the people shall *beg* for the master” in 342⁵⁰. Nearly a century later this kind of begging started to change into consenting: In the south of France emerged in the 5th century with the *Statuta ecclesiae antiqua* a collection of (probably not authentic, but nevertheless widespread) canonical rules⁵¹, which demanded a *consensus clerico-*

47 Breviarium Hipponense (collection of the canons of the council of Hippo), c. 20: ... *Ut nullus ordinetur nisi probatus uel episcoporum examine uel populi testimonio* (CChr.SL 259, 39, 122f. Munier); for a discussion of the *Breviarium Hipponense* as source of ecclesiastical legal history see J. Gaudemet, *Les sources du droit de l'Eglise en Occident du II^e au VII^e siècle*, Paris 1985, 80f.

48 See for example *Registri ecclesiae Carthaginensis Excerpta*, c. 78, transmitting a rule of the council of Carthage 401 (CChr.SL 259, 203, 721 Mun.) with the rule *cum omnium voto eis episcopus ordinetur*.

49 Siricius, Decretal *Ad Gallos Episcopos (Dominus inter cetera)*, RPR (J) after 285, c. 5/13, quoted from Y.-M. Duval, J. Sirmond, *La décrétale Ad Gallos Episcopos: son texte et son auteur, texte critique, traduction française et commentaire*, SVig Christ 73, Boston, MA 2004, 42: *Non enim quid populus velit, sed quid evangelica disciplina perquiratur. plebs tunc habet testimonium, quotiens ad digni alicuius meritum auram favoris impertit*. The date of this text is, however, strongly debated, see D. Jasper, *The Beginning of the Decretal Tradition. Papal Letters from the Origin of the Genre through the Pontificate of Stephen V*, in: D. Jasper, H. Fuhrmann, *Papal Letters in the Early Middle Ages*, Washington D.C. 2001, 3-133, 28-32.

50 Council of Serdica, c. 5: ... *quod populi petant sibi rectorem*, quoted from H. Hess, *The Early Development of Canon Law and the Council of Serdica*, Oxford 2002, 214.

51 Gaudemet, *Sources du droit* (see note 47), 84-86 ; short survey by L. Kéry, *Canonical Collections of the Early Middle Ages (ca. 400-1140). A Bibliographical Guide to Manuscripts and Literature, History of Medieval Canon Law*, 1, Washington D. C. 1999, 7f., s v. “*Statuta ecclesiae antiqua*” with further reference.

rum et laicorum.⁵² This notion of consent became even stronger in the legislation of the Roman bishops: Celestine I (422-431) and Leo I (440-461) stressed the importance of the willing consent of the laity and the clergy for the episcopal promotion. In a 428 issued decretal Celestine created a phrase, which circulated for hundreds of years throughout Christian Europe: “No bishop shall be given against the will (of the clergy, the laity and the ‘order’). The consent of the clergy, the plebeians and their wish is required.”⁵³ Nearly 20 years later Leo I gave this idea an even stronger phrasing in a statement of principle: “When the election of the highest priest will be treated, he shall be placed over all, whom the consent of the clergy and the plebeians has demanded... so that no one is ordained against the will of those who are not asking for him, so that the community does not despise or hate an unwanted bishop”.⁵⁴ The reference to an “unwanted bishop” reveals the background of this rule and the other provisions as well: The church was not unacquainted with sometimes very sharp conflicts accompanying episcopal promotions, which had emerged since the 4th century. In particular resistance of the laity against a new bishop consecrated without even questioning the parish was not uncommon.⁵⁵ Obviously Celestine I and Leo I had these problems in mind, when they issued their rules. At the same time the legitimatizing function of electoral consent gained more importance. At one point, Leo I even stated *Qui praefuturus est omnibus, ab omnibus eligatur* – who shall govern all people, shall be elected by all of them.⁵⁶

Leo’s ideas about these elections in concrete, however, were obviously influenced also by the Cyprianic tradition: He adopted the role distinction between the clergy, the laity and the conprovincial bishops and added the

52 *Cum in his omnibus examinatus inuentus fuerit plene instructus, tunc consensu clericorum et laicorum et conuentu totius prouinciae episcoporum... ordinetur episcopus* (CChr.SL 148, 165f., 36-39 Munier).

53 Decretal *Cuperemus*, 428, RPR (J) 369, c. 5: *Nullus inuitis detur episcopus. Cleri, plebi et ordinis consensus et desiderium requiratur* (ed. P. Coustant, *Epistolae Romanorum Pontificum, et quae ad eos scriptae sunt. A S. Clemente I usque ad Innocentium III* Paris 1721, repr. Farnborough 1967, ep. 4, col. 1070. For a deeper discussion of the decretal and its transmission by medieval canonists see A. Thier, *Dynamische Schriftlichkeit. Zur Normbildung in den vorgratianischen Kanonessammlungen*, ZSR.K 93, 2007, 1-33, 13-32.

54 Decretal *Quanta fraternitati*, 446, RPR (J) 411, c. 5: *Cum ergo de summi sacerdotis electione tractabitur, ille omnibus praeponatur quem cleri consensus concorditer postularit ... ut nullus inuitis et non petentibus ordinetur; ne civitas episcopum non optatum aut contemnat, aut oderit* (Leo I, *Opera omnia* 1, PL 54, 673).

55 See the discussion by Norton, *Episcopal Elections* (see note 1), 56-70, 215-238 with further reference.

56 Decretal *Divinae cultum*, RPR (J) 407, c. 6 (Leo I, *Opera Omnia* 1, PL 54, 634).

metropolitan bishop. The task (and the power) of the clergy was described as *eligere* (elect), the *laity* (plebs) was assigned to *expetere* (wish, long for) the candidate, the conprovincial bishops were to consecrate him, while the metropolitan bishop should deliver a *iudicium* (judgement) on the potential bishop.⁵⁷ Against this background it might be said that Leo remained obliged to the conceptual framework of the Cyprianic tradition, but understood the laical and the clerical consent to the episcopal candidate as indicator for the rightness of his promotion to bishop. The idea of a coordinated examination of the episcopal candidate became weaker here, even though the purpose of an election (to guarantee a well-ordered selection of a qualified person by procedural rules) kept its importance.

Conclusion

As a matter of fact, this short paper could provide only a few observations and suggestions about the multiple legal approaches on episcopal election in the western church. But it may have become clear that some major (even though sometimes opposing) tendencies of ruling can be distinguished. This kind of dynamics proceeded in the transmission of these texts. The canonical collections preserved the texts of popes and councils.⁵⁸ But they did more than that. While editing these texts the compilers also frequently tried to interpret their meanings by ways of systematic order, rubricating and sometimes also by direct intervening into the textual body.⁵⁹

One very influential example of this approach may be given here: When Martin of Braga († 579/580) created around 572 his collection, the

57 Decretal *Epistolas fraternitatis*, around 458/459, RPR (J) 544, (Leo I, Opera Omnia 1, PL 54, 1203): *Nulla ratio sinit ut inter episcopos habeantur qui nec a clericis sunt electi, nec a plebibus sunt expetiti, nec a provincialibus episcopis cum metropolitani iudicio consecrati*. For a deeper discussion of this decretal and its medieval transmission see Thier, *Dynamische Schriftlichkeit* (see note 53), 13–32.

58 For a survey see G. Fransen, *Les collections canoniques*, TSMÂO, 10, A-III.1*, Turnhout 1973 repr. in: Id., *Canones et Quaestiones. Évolution des doctrines et système du droit canonique*, 1/1: *Manuscripts Juridiques et Collections Canoniques*, ed. A. García y García, *Bibliotheca Eruditorum*, 25, Goldbach 2002, nr. 26, 313*–365*.

59 For a discussion about the function of medieval canonical collections as a legal memory of the church and as mirror of the changing interpretations of the preserved text see Thier, *Dynamische Schriftlichkeit* (see note 53), 1–9 and passim with further reference.

so called *Capitula Martini*,⁶⁰ he used the texts of the Laodicean council, mentioned before, in a very interesting manner: He combined both canons thus producing a new rule: *Non liceat populo electionem facere eorum qui ad sacerdotium provocantur sed iudicium sit episcoporum, ut ipsi eum qui ordinandus est (,) probent, si in sermone et fide et in spirituali vita edoctus est.*⁶¹ The people were not allowed to elect bishops. The judgment on the episcopal candidates should be made only by the bishops based on a careful examination of these candidates. It was not coincidental that Martin used the term *populo* instead of *turba* or *multitudo*: Apparently, Martin adopted in this point the linguistic tradition of Roman law and the cyprianic tradition. Here, *populus* was used to describe an active entity, in Cyprian's works it described (as mentioned above) the laity in general. Hence, the use of *populus* in Martin's text highlighted the exclusionary power of his rule. Another influential compiler, Dionysius Exiguus⁶², had – in translating the Laodicean canon 13 into Latin – used the term *turbis* for τοῖς ὄχλοις, thus referring to a disordered crowd (*turba*).⁶³ So, in this text another notion of the laity, as an ordered well-behaving entity remained at least thinkable. Martin of Braga, however, excluded the laity as a whole – may it be ordered or disordered, well behaving or raucously – from the electoral process. As a consequence, the electoral power was concentrated in the *iudicium* of the conprovincial bishops in Martin's text. This new interpretation of the Laodicean canons would become very influential until the 12th century.⁶⁴

60 J. Gaudemet, „Traduttore, traditore” – Les Capitula Martini, in: Fälschungen im Mittelalter. Internationaler Kongreß der Monumenta Germaniae Historica München, 16. – 19. September 1986, Teil II: Gefälschte Rechtstexte. Der bestrafte Fälscher, MGH, Schriften, Bd. 33/2, Hannover 1988, 51–65.

61 Canones Apostolorum et Conciliorum (see note 40), 43.

62 For a recent case study on Dionysius' work as translator see M. Sommar, Dionysius Exiguus' Creative Editing, in: Proceedings of the XII International Congress of Medieval Canon Law, Washington, D.C. August 1–7, 2004, ed. U.-R. Blumenthal, K. Pennington, MIC.C 13, Vatican City, 2009, 209–222 (discussing Dionysius' translation of c. 15 of the Nicene canons).

63 *Quod non sit permittendum turbis electiones eorum facere qui sunt ad sacerdotium provehendi* (EOMJA 2/2, 253 Turner).

64 The Decretum Gratiani used Martin's rule (inserted as D. 63, c. 8) in particular to prove the general rule that *Laici uero nullo modo se debent inserere electioni* (DG ante Dist. 63, c. 1 cf. Decretum Gratiani, ed. E. Friedberg, Leipzig 1879, repr. Graz 1959, col. 234); the connection to the investiture contest becomes abundantly clear by Gratian's interpretation of Martin's text: *his omnibus auctoritatibus laici excluduntur ab electione sacerdotum, atque iniungitur eis necessitas obediendi, non libertas imperandi* (DG post Dist. 63, c. 8, cf. Decretum Gratiani, ed. Friedberg, col. 237). For a deeper discussion see Thier, Hierarchie und Autonomie (see note 10), 415–417.

It would be easy to present more examples for the rising importance of late antique rulings in the time since around the late 11th century. Bernold of Constance for example formulated the imperative that the pope should *semper magis antiqua exequi et observare quam nova instituere*.⁶⁵ Examples like this do not only prove the importance of late antique normative rules within the scriptural legal culture of the medieval church. It might also come clear that in particular since the 11th century the *canonicas traditiones et decreta sanctorum partum*, as Gregory VII put it⁶⁶, got more and more importance.

But this was also true for the late antique period itself: Even though the rules and ideas of Popes and councils were frequently violated, and even though Cyprian's ecclesiologically based concept of episcopal elections might appear more as a theory than a framework with binding legal power, those texts were at the same time perceived at least as normative guidelines for valid episcopal elections. Apparently, compliance with these rules increased the likelihood that a new bishop would be accepted by clerics and laity. On the other hand, non-compliance with these norms could endanger the legitimacy of episcopal power, thus driving the potentially illegitimate office holder into other kinds of dependencies (e. g. on secular rulers or political concessions). So, it might be that the norms discussed here cannot be classified as "law" in the modern sense of this term, as enforceable rules.⁶⁷ But given their widespread acceptance in the political discourse and their apparent presence in the ecclesiastical memory they came close to legal rules.

65 Bernold of Constance, *De excommunicatis vitandis, de reconciliatione lapsorum et de fontibus iuris ecclesiastici* (libellus X), ed. D. Stöckly, MGH.F 15, Hannover 2000, 185, 24.

66 Gregory VII, decretal *Pervenit ad aures*, 1074, RRRP (J) 4837, in: *Das Register Gregors VII.*, ed. E. Caspar, MGH Epp. sel. 2,1, Berlin 1955, nr. 1/60, 88, 3.

67 For a discussion of the modern concepts of law referred to in this context see the survey in: K. F. Röhl/G. C. Röhl, *Allgemeine Rechtslehre*, Köln/München 2008, 17-76; M. Mahlmann, *Rechtsphilosophie und Rechtstheorie*, Baden-Baden 2010, 247-254.

